**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

In the Matter of

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| Developing a Unified Intercarrier Compensation Regime | | CC Docket No. 01-92 |
| Petitions for Declaratory Ruling Regarding Intercarrier Compensation for Wireless Traffic | ) | DA 02-2436 |

## JOINT CMRS PETITIONERS' OPPOSITION TO THE MONTANA ILEC MOTION TO DISMISS

The undersigned providers of commercial mobile radio service (collectively, "CMRS Petitioners' submit this Opposition to the Motion to Dismiss their Declaratory Ruling Petition which certain Montana Incumbent Local Exchange Carriers ("Montana ILECs") filed on October 18, 2002. As demonstrated below, none of the three reasons cited in the Motion has merit.

### I. The Rule 1.1206, Note 1 Service Provision Does Not Apply to the CMRS Declaratory Ruling Petition

[1] The CMRS Petitioners include: T-Mobile USA, Inc.; Western Wireless Corporation; Nextel Communications and Nextel Partners. T-Mobile USA, Inc. (formerly known as VoiceStream Wireless Corporation), combined with Powertel, Inc., is the sixth largest national wireless provider in the U.S. with licenses covering approximately 94 percent of the U.S. population and currently serving over eight million customers. T-Mobile and Powertel are wholly-owned subsidiaries of Deutsche Telekom, AG and are part of its T-Mobile wireless division. Both T-Mobile and Powertel are, however, operated together and are referred to in this request as "T-Mobile." Western Wireless is the leading provider of cellular service to rural areas in the western United States. The company owns and operates wireless phone systems marketed under the Cellular One national brand name in 19 states west of the Mississippi River. Western Wireless owns cellular licenses covering about 30% of the land in the continental United States. It owns and operates cellular systems in 88 Rural Service Areas ("RSAs") and 18 Metropolitan Statistical Areas ("MSAs") with a combined population of around 9.8 million people. Nextel Communications, Inc. is a nationwide CMRS carrier, providing a unique combination of cellular radio service, short-messaging, Internet access, data transmission, and a two-way digital radio feature. Nextel Partners provides wireless digital communications services in mid-sized and smaller markets throughout the U.S. Through affiliation with Nextel Communications, Inc., its customers have seamless nationwide coverage on the Nextel Digital Mobile Network.

The Montana ILECs assert that the CMRS Petition "necessarily" seeks to "invalidate" unspecified "state commission orders" approving wireless terminations tariffs.[2] Accordingly, the Montana ILECs contend, the CMRS Petitioners are seeking to "preempt state law" and as a result, "were required to comply with the provision of the ex parte rules mandating that all preemption petitions be served on the affected government agencies."[3]

In fact, the CMRS Petitioners do *not* ask the Commission to "preempt" any state law. They rather ask the Commission to reaffirm *existing federal* law, as made apparent from the first page of their Petition:

> [The CMRS Petitioners] petition the Commission to enter a declaratory ruling reaffirming that wireless termination tariffs are not a proper mechanism for establishing reciprocal compensation arrangements for the transport and termination of telecommunications under the Communications Act.[4]

Moreover, the CMRS Petitioners do *not* ask the Commission to take any action against any state regulatory commission or to invalidate any state commission order. The relief the CMRS Petitioners seek is rather directed against those ILECs that have prepared and filed interconnection tariffs in disregard of federal law. The Petitioners were very clear in asking the Commission to "enter an order directing ILECs to withdraw any wireless termination tariffs in existence today."[5] The Montana ILECs appear to suggest that they may be relieved of having to comply with *federal* law simply because the petitioners did not serve a *state* agency.

Given the Supremacy Clause of the U.S. Constitution,[6] state law may be modified (and state agency discretion limited) each time Congress enacts a new statute or a federal administra-

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[2] Montana ILEC Motion to Dismiss at 2-3.

[3] *Id.* at 2, *citing* 47 C.F.R. § 1.1206 Note 1

[4] Petition for Declaratory Ruling at 1.

[5] *Id.* at 2.

[6] U.S. CONST., Article VI, Clause 2.

tive agency like the FCC interprets and applies federal statutes. The Commission does not serve state commissions before it enters an order interpreting the Communications Act – even though the order "necessarily" will limit state discretion (because state action inconsistent with federal law is barred by the Supremacy Clause). By the same token, private parties are not required to serve each state commission before asking the FCC to interpret *federal* law. And, private parties certainly are not required to serve state commissions where, as here, they simply ask the FCC to reaffirm *existing federal* law. In this instance, the "preemption" over which the Montana ILECs complain has already occurred when Congress enacted the 1996 Act mandating that interconnection between carriers be governed by the negotiation/arbitration/federal court review procedures that Congress specified in the Act. As the Commission has already held, the tariff process for interconnection with other carriers could "not have been intended by Congress, given the central role played by the section 251-252 process in the Telecommunications Act of 1996."[7]

In this regard, the Petition raises none of the concerns of fairness that caused the Commission to adopt the service requirement of Note 1 to Rule 1.1206. The Commission adopted this rule because there were instances where it was being asked to preempt a specific state law or agency order and "the jurisdictions named in the petition were not aware of the petition or the allegations made about them in the petition."[8] Here, the CMRS Petitioners do not ask the Commission to preempt any state law or any particular state commission order. They ask only that the Commission reaffirm existing federal law and to require ILECs subject to its regulatory au-

[7] *Bell Atlantic* v. *Global NAPs*, 15 FCC Rcd 20665, 20671 ¶ 16 (2000).

[8] *Amendment of 47 C.F.R. §§ 1.1200 et seq.*, 14 FCC Rcd 18831, 18838 ¶ 28 (1999).

thority to comply with this law. Thus, the Rule 1.1206 "Note" upon which the Montana ILECs rely has no applicability to the instant Declaratory Ruling Petition.

## II. The CMRS Petitioners Were Not Required to Serve ILECs Individually Nor File a Formal Complaint

The Montana ILECs also complain that the CMRS Petitioners "fail[ed] to serve the LECs whose tariffs are at issue."[10] However, the Montana ILECs do not recite any FCC rule obligating the CMRS Petitioners to serve their Declaratory Ruling on anyone, and the CMRS Petitioners cannot reasonably be accused of a "failure to serve" absent an affirmative obligation to serve. The Commission followed its customary practice of issuing a Public Notice concerning the Declaratory Ruling Petition,[11] and given that the Montana ILECs timely filed both comments and a motion to dismiss, it is apparent that the Montana ILECs had actual notice of the Petition.

The Montana ILECs further assert that the Declaratory Ruling Petition "must be dismissed as procedurally improper" because, they claim, "requests to invalidate tariffs should not be brought as declaratory ruling requests, but as formal complaints."[12] The problem with this argument is that the Montana ILECs have misread the one FCC order they recite, for the "1999 *Logicall* decision" actually supports use of the declaratory ruling procedure in circumstances such as this.

In *Logicall,* a long distance carrier (ICTC) filed a petition for declaratory ruling "challenging the authority of the National Exchange Carrier Association (NECA) to bill and collect

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[9] *See, e.g., TSR Wireless* v. *U S WEST,* 15 FCC Rcd 11166, 11183 ¶ 29 (2000), *aff'd Qwest* v. *FCC,* 252 F.3d 462 (D.C. Cir. 2001)(Parties were not required to serve state commissions even though FCC ruled that ILECs could not hide behind their own state tariffs.).

[10] Montana ILEC Motion to Dismiss at 3.

[11] *See Public Notice,* Comment Sought on Petitions for Declaratory Ruling Regarding Intercarrier Compensation for Wireless Traffic, CC Docket No. 01-92, DA 02-2436 (Sept. 30, 2002).

[12] Montana ILEC Motion to Dismiss at 3 (emphasis in original).

the Universal Service Fund (USF) and Lifeline Assistance (LA) charges . as agent for its member local exchange carriers."[13] The Commission addressed the merits of this "authority to file tariffs" issue in response to the declaratory ruling petition.[14] So too here, the CMRS Petitioners challenge the very authority of ILECs to file wireless termination tariffs without first conducting negotiations as mandated by the 1996 Act. The *Logicall* decision that the Montana ILECs cite thus supports use of the declaratory ruling procedure where the issue presented involves the "authority to file tariffs."[15]

The Montana ILEC argument – that CMRS Petitioners should be required to use the complaint procedure – also makes no sense. Requiring CMRS carriers to file and prosecute dozens (or hundreds) of formal complaints involving the identical legal issue – would be administratively inefficient in the extreme and would benefit no one (whether ILECs, CMRS providers or the Commission).[16]

The CMRS Petitioners deliberately chose to file a declaratory ruling petition so as to maximize the opportunity for *all* interested persons, including the Montana ILECs, to address the

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[13] *Communique Telecommunications d/b/a Logicall Application for Review of the Declaratory Ruling and Order Issued by the Common Carrier Bureau; InterContinental Telephone Corp. Petition for Declaratory Ruling on National Exchange Carrier Association Tariff F.C.C. No. 5 Governing Universal Service Fund and Lifeline Assistance Charges,* 14 FCC Rcd 13635 ¶ 1 (1999).

[14] *See id.* at 13645-49 ¶¶ 17-26.

[15] ICTC also challenged the "self-help provisions in NECA's tariff." The FCC declined to address this point because no NECA member had threatened to invoke this challenged provision. *Id.* at 13650 ¶ 27. Here, the CMRS Petitioners do not challenge any particular provision of any particular ILEC wireless termination tariff. They rather challenge the ILEC's very authority to file such tariffs without conducting interconnection negotiations.

[16] The CMRS Petitioners also find it perplexing that the Montana ILECs would even make this argument given their expressed concern over notice and participation. For example, under the approach the Montana ILECs advocate, the CMRS Petitioners could have filed a formal complaint against one or more of the Nebraska ILECs that recently filed interconnection tariffs in lieu of negotiating interconnection arrangements with CMRS carriers. ILECs in the other 49 states, including the Montana ILECs, would have received no notice of such complaints and would have been precluded from participating because they would not be parties. Thus, the Montana ILECs appear to be advocating a position that would reduce (if not, eliminate altogether) their opportunity to participate in the decision-making process.

narrow "authority to file tariffs" issue the CMRS Petitioners raised. As the Petitioners explained in their Petition:

> The CMRS Petitioners contemplated filing Section 208 complaints against the ILECs that have engaged in this unlawful activity, but with such a procedure, interested carriers that are not parties to the complaint proceeding would have been unable to participate. The CMRS Petitioners therefore decided to file this declaratory ruling petition, so as to maximize the opportunity of all parties to participate in this proceeding and enable the Commission to act upon a more complete record.[17]

Subsequent developments have confirmed the validity of the approach that the CMRS Petitioners utilized. Small ILEC associations (state and national) and consultants representing hundreds of small ILECs filed extensive comments in response to the CMRS Petition. This widespread participation would have been precluded had the CMRS Petitioners instead chosen to follow the complaint procedure that the Montana ILECs apparently favor.

## III. There Is No Equitable Requirement That the Petition Be Dismissed

The Montana ILECs' final argument is that the Commission should dismiss the Declaratory Ruling on "equity" grounds:

> [T]he CMRS Carriers are requesting direct interference with existing state laws and previously state commission decisions. Such a ruling could interfere with the billing and collection of lawfully tariffed rates which have already been provided for at the state level.[18]

The Montana ILECs have a rather odd view of "equity." This Commission has ruled repeatedly that "using the tariff process to circumvent the section 251 and 252 processes cannot be allowed."[19] The Montana ILECs appear to be suggesting that because they chose to disregard explicit FCC orders, the Commission should now "give them a break" by condoning retroac-

[17] Declaratory Ruling Petition at 1-2 n.2.

[18] Montana ILEC Motion to Dismiss at 3.

tively their unlawful actions. Of course, the Commission cannot condone a violation of its rules and orders. Notably, the CMRS Petitioners do not ask the Commission to institute a forfeiture proceeding against those ILECs that have fragrantly disregarded explicit FCC orders. They ask only for the Commission to reaffirm the obvious – namely, ILEC tariffs that are inconsistent with FCC orders and rules are "without effect."[20]

One point bears mention in closing. This proceeding does *not*, as the Montana ILECs would like to suggest, involve an issue of "state's rights." As the U.S. Supreme Court has declared, the concept of "state's rights" has little relevance in the context of interconnection:

> This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew."[21]

Indeed, Congress has specifically directed the Commission to "establish a Federal regulatory framework to govern the offering of all commercial mobile services,"[22] and with respect to CMRS-LEC interconnection, it has amended Section 2(b) of the Act precisely so the Commission can adopt national rules governing the interconnection of all CMRS traffic, including intrastate traffic.[23]

The Commission has held that state tariffs filed by ILECs are void and unenforceable if the tariffs are inconsistent with its orders and rules.[24] It has similarly ruled unequivocally that

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[19] *Bell Atlantic* v. *Global NAPs,* 15 FCC Rcd 12946, 12959 ¶ 23 (1999). *See also Bell Atlantic* v. *Global NAPs,* 15 FCC Rcd 5997, 6002 ¶ 14, 6004 ¶ 20 (2000)(same); *Bell Atlantic* v. *Global NAPs,* 15 FCC Rcd 20665, 20671 ¶ 16 (2000)(same).

[20] *Cipollone* v. *Liggett Group,* 505 U.S. 504, 416 (1992).

[21] *Id.*

[22] H.R. REP. NO. 103-213. 103d Cong., 1st Sess. 490 (1993).

[23] *See Developing a Unified Intercarrier Compensation Regime,* 16 FCC Rcd 9610, 9637-40 31 ¶¶ 78-84 (2001

[24] *See, e.g., TSR Wireless* v. *U S WEST,* 15 FCC Rcd 11166, 11183 ¶ 29 (2000)("[A]ny LEC efforts to continue charging CMRS or other carriers for delivery of such traffic would be unjust and unreasonable and violate the Commission's rules, *regardless of whether the charges were contained in a federal or a state tariff.*")(emphasis

that "using the tariff process to circumvent the section 251 and 252 processes cannot be allowed."[25] There is no basis in equity, and certainly no basis in law, for the Commission to now rule retroactively that state tariffs that were void and unenforceable can now be deemed lawful.

added), *aff'd Qwest* v. *FCC,* 252 F.3d 462 (D.C. Cir. 2001). *See also Metrocall* v. *Concord Telephone,* File No. ED-01-MD-008, DA 02-301, at ¶ 7 (Feb. 8, 2002)("[W]e have jurisdiction to resolve Metrocall-s complaint, notwithstanding the fact that the disputed charges were contained in a pre-1996 Act state tariff.").

[25] *Bell Atlantic* v. *Global NAPs,* 15 FCC Rcd 12946, 12959 ¶ 23 (1999). *See also Bell Atlantic* v. *Global NAPs,* 15 FCC Rcd 5997, 6002 ¶ 14, 6004 ¶ 20 (2000)(same); *Bell Atlantic* v. *Global NAPs,* 15 FCC Rcd 20665, 20671 ¶ 16 (2000)(same).

## Conclusion

For the forgoing reasons, the CMRS Petitioners respectfully request that the Commission deny the Motion to Dismiss filed by the Montana ILECs.

Respectfully submitted,

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**Certificate of Service**

I, Lorrie Turner, hereby certify that that on October 31, 2002, I caused a copy of the foregoing Opposition to Motion to Dismiss filed electronically with the FCC to be served on James H. Lister, counsel for the Montana ILECs, *via* facsimile (at 202-857-1737) and *via* email (at jlister@mcguirewoods.com).

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